A

COUNTRY HEIGHTS HOLDINGS BHD

v.

RATING AGENCY MALAYSIA BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN YUNUS J
[CIVIL SUIT NO: S3-22-1306-2005]
11 MARCH 2008

C ***CIVIL PROCEDURE:*** *Striking out - Appeal against - Whether plaintiff's statement of claim ought to be struck out - Whether frivolous, vexatious and an abuse of court process - Rules of the High Court 1980, O. 18 r. 19(1)*

D ***TORT:*** *Defamation - Libel and slander - Allegation of - Whether plaintiff had acquiesced to contents and publication of review - Whether there was a triable issue - Whether allegations vague and lacking in material particulars*

E This was an appeal by the plaintiff against the decision of the senior assistant registrar allowing the defendant's application pursuant to O. 18 r. 19(1) Rules of the High Court 1980 that the plaintiff's statement of claim ought to be struck out on the grounds that it was frivolous, vexatious and an abuse of the process of the court, and that the action be dismissed. The F plaintiff's claim against the defendant was for damages for negligence and defamation following the publication of a rating review by the defendant in respect of the performance of the plaintiff's company. The plaintiff had appointed the defendant, a rating agency, to conduct the official rating of the plaintiff's G proposed RM250,000,000 mortgaged bonds with detachable warrant 1995/2000 ('the redeemable bonds'). The plaintiff had required the rating in respect of the redeemable bonds to enable the plaintiff to comply with the guidelines of the Securities Commission and to generate confidence and interest among the H public to subscribe to the redeemable bonds. The defendant had, pursuant to the appointment, prepared the review and disseminated the same to the public. It was alleged by the plaintiff in the statement of claim that the review was incorrect, contained inaccuracies and had a misleading view of the financial standing of I the plaintiff and its business. The defendant in its statement of defence denied that the review contained errors and inaccuracies; and further averred that even if the review contained errors and

inaccuracies, the plaintiff had acquiesced to the contents of the review. The plaintiff claimed that the defendant had breached the duty of care that the defendant owed to the plaintiff and thus the plaintiff had suffered loss and damage. The plaintiff also claimed that the alleged incorrect and inaccurate statements in the review had injured the plaintiff's credit and reputation, and hence was defamatory to the plaintiff.

Held:

(1) The plaintiff had full prior knowledge of what would be the contents of the review and indeed had given their approval. The plaintiff's claim that the defendant was guilty of the tort of negligence and libel was, therefore, frivolous, vexatious and an abuse of the process of the court. The plaintiff by its conduct had acquiesced to the contents as well as to the publication of the review. Since the plaintiff had acquiesced, it was not open to them to complain that it had suffered loss or damage as a consequence of the publication of the allegedly incorrect and inaccurate statements in the review. There was clearly no triable issue established herein. The allegations on the plaintiff's affidavits were vague and lacking in material particulars, hence could not be taken seriously. (para 14 & 20)

[Order accordingly.]

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19(1)

Other source(s) referred to:
Halsbury's Laws of Malaysia, Vol 26, 2005, Malayan Law Journal, p 555, para 450.402

For the plaintiff - MC Lee; M/s Hazidin Chan
For the defendant - Kevin Prakash; M/s Shook Lin & Bok

Reported by Suhainah Wahiduddin

JUDGMENT

Hishamudin Yunus J:

[1] This is an appeal by the plaintiff against the decision of the learned senior assistant registrar, who had allowed the defendant's application pursuant to O. 18 r. 19(1) of the Rules of the High Court 1980 that the plaintiff's statement of claim ought to be

A struck out on the grounds that it is frivolous, vexatious and an abuse of the process of court, and that the action be dismissed with costs.

[2] The plaintiff's claim against the defendant is for damages for
B negligence and defamation following the publication of a rating review by the defendant in respect of the performance of the plaintiff's company.

[3] I have dismissed the plaintiff's appeal with costs. The following are the grounds for my decision.
C

[4] The plaintiff appointed the defendant, a rating agency, on 5 September 1995 to conduct the official rating of the plaintiff's proposed RM250,000,000 Mortgaged Bonds with Detachable Warrant 1995/2000 ("the redeemable bonds"). The plaintiff
D required the rating in respect of the redeemable bonds to enable the plaintiff to comply with the guide lines of the Securities Commission and to generate confidence and interest among the public to subscribe to the redeemable bonds.

E **[5]** In April 2002 the defendant, pursuant to the appointment, prepared the fifth rating review of the redeemable bonds ("the review") and disseminated the same to the public.

[6] It is alleged by the plaintiff in the statement of claim that
F the review was incorrect, contained inaccuracies and gave a misleading view of the financial standing of the plaintiff and its business. The particulars of the incorrect and inaccurate statements are set out at para. 6(b)(i) to 6(b)(xii) of the statement of claim.

G **[7]** The defendant in its statement of defence denies that the review contains errors and inaccuracies; and further avers that, even if the review contains errors and inaccuracies, the plaintiff has acquiesced to the contents of the review.

H **[8]** Without going into details, the dispute between the parties revolves on the statements in the review regarding the financial health of the plaintiff company. The review, among others, contains the following statements:

I (1) The downgrade reflects the deteriorating performance of CHHB's operating assets as well as its higher annual repayment obligations following changes in the terms of its bonds;

(2) Given the expected shortfall of its operational cash flow, CHHB's corporate proposals are critical towards easing its debt burden;

(3) RAM believes that CHHB's financial outlook in the intermediate term is gloomy due to its large financial commitments, many of which will fall due over the next three years;

(4) Weighed against its large financial commitments, the group is unlikely to be able to generate sufficient operational cash flow to meet its various obligations; and

(5) Until its fund raising exercise are successfully implemented, the timely repayment of RM62 million in relation to the bonds (plus interest), due on 31 December 2002, remains uncertain.

[9] The plaintiff claims that the defendant, by reason of the alleged incorrect and inaccurate statements in the review, has breached the duty of care that the defendant owes to the plaintiff and thus the plaintiff has suffered loss and damage.

[10] The plaintiff also claims that the alleged incorrect and inaccurate statements in the review have injured the plaintiff's credit and reputation, and hence are defamatory of the plaintiff.

[11] In this judgment, I wish to proceed and deliberate on the hypothesis that the review contains incorrect and inaccurate information on the financial health of the plaintiff company.

[12] Proceeding on the above hypothesis, it is, however, my judgment that the plaintiff's claim is frivolous, vexatious and an abuse of the process of court. I shall explain as to why I say so.

[13] I refer to the affidavits of the parties. Now, upon examining the affidavit evidence of parties, it is undisputed that the plaintiff was constantly consulted during the preparation of the review. It is also not disputed that a draft copy of the review was sent to the plaintiff on 16 April 2002 in advance of the publication, and that the plaintiff by their letter dated 23 April 2002 made amendments or corrections to the draft and approved its contents. The comments/amendments proposed by the plaintiff were adopted by the defendant and incorporated in the review; and the review, which was subsequently published, reflected the proposed changes. The plaintiff, therefore, had full prior knowledge of what would be the contents of the review and, indeed, had given their approval.

[14] In my judgment, the plaintiff's claim that the defendant is guilty of the tort of negligence and libel is, therefore, frivolous, vexatious and an abuse of the process of court. I so hold because, in the light of the above facts, the plaintiff by its conduct had acquiesced to the contents as well as to the publication of the review. Since the plaintiff had acquiesced, it is now not open to them to complain that it has suffered loss or damage as a consequence of the publication of the allegedly incorrect and inaccurate statements in the review.

[15] It is a principle of law that where a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing that right, stands by in such a manner as really to induce the person committing the act, and who might have otherwise have abstained from it, to believe that he assents to its being committed, that person (who stands by) has acquiesced to that act; and that person so standing by cannot afterwards be heard to complain of the act (see *Halsbury's Laws of Malaysia*, Vol. 26, 2005, Malayan Law Journal, p. 555, para 450.402).

[16] Now, in opposing the defendant's present striking out application, the plaintiff has averred in their affidavits that the reason as to why they (the plaintiff) did not comment on the allegedly incorrect and inaccurate statements was because the defendant, through its executives whom the plaintiff is unable to name or identify, had imposed a 'restriction' on the plaintiff's right to comment on the defendant's opinions, findings and interpretations as contained in the draft copy of the review. In the affidavit of the plaintiff at encl. 13, the deponent (one Lee Kim Tiong, the managing director of the plaintiff company) states:

> 5. During the said discussion, I was informed by the executives of the defendant, whose names and identities I cannot recollect, that the defendant was the only rating agency in Malaysia and that their ratings were authoritative and indisputable.
>
> 6. The said executives of the defendant also informed me that the appointment of the defendant was subject to the following understanding and conditions:
>
> (a) That the defendant would issue independent and competent ratings and reviews of the Redeemable Bonds;

(b) In order to ensure the independence of the defendant, the plaintiff shall not be entitled to question or to correct the defendant's opinions, findings and interpretations of data in the issue of a rating of the Redeemable Bonds; and

(c) The plaintiff would only be called upon and be permitted to submit to the defendant financial and economic data, which were a matter of record.

[17] In the affidavit of the plaintiff at the encl. 13A, the same deponent affirmed as follows:

8. In answer to paragraph 7 of the defendant's affidavit, I hereby deny that the methodology adopted by the defendant in preparation of the 2002 Rating Review complied with reasonable standards of care expected of a rating agency. In particular, the following procedures of the defendant were in contravention of conventional rating methodologies:

…

…

(c) The restriction of the plaintiff to comments or correction relating only to statistical and published financial data without the right or opportunity to challenge the opinions, findings and interpretation of data by the defendant.

[18] The defendant, in their in affidavit in reply, denies the above allegations. In the defendant's affidavit at encl. 16 (that of one Suresh Kumar, the executive director of the defendant company) it is averred as follows:

7.(3) Paragraph 8(c) is wholly untrue and denied. The defendant's appointment did not restrict the plaintiff from commenting on the plaintiff's opinions, findings and interpretations by the defendant. This entire averment is wholly based on the fictitious discussion that purportedly took place between the deponent of this affidavit and the plaintiff's managing director [the deponent of the plaintiff's Reply (1)] and purely created for the sole purpose of defeating this instant application.

…

18. Paragraph 6 of the plaintiff's Reply (1) is denied and in reply I repeat paragraph 5 above. I reiterate that the terms of the defendant's appointment are fully contained in the plaintiff's letter of appointment dated 5.9.1995 and properly set out in paragraph 5 of the defendant's

A affidavit. I specifically refer to the letter of appointment dated 5.9.1995 (Exhibit "A" of the defendant's affidavit) and state that it is not a term of the defendant's appointment that the plaintiff shall not be entitled to question or to correct the defendant's opinions. I am also advised in law and verily believe that the contents of the purported discussion between them are not pleaded in the statement of claim and therefore cannot be relied on in respect of this instant application.

[19] The plaintiff contends that, based on the above conflicting C affidavit evidence, the question as to whether or not they had acquiesced to the contents of the rating review is a triable issue; and thus the plaintiff's claim cannot be summarily be dismissed as being frivolous, vexatious and an abuse of the process of court.

D **[20]** In my judgment, there is clearly no triable issue established here. In the present application, the legal and evidential burden is on the plaintiff to convince the court that there is a triable issue. But I have examined the plaintiff's affidavits as set out above. Obviously the allegations in the affidavits are vague and lacking in E material particulars, and hence they cannot be taken seriously.

F

G

H

I